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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of)	
)	WT Docket No. 08-165
Petition for Declaratory Ruling to Clarify)	
Provisions of Section 332(c)(7)(B) to Ensure)	
Timely Siting Review and to Preempt under)	
Section 253 State and Local Ordinances that)	
Classify all Wireless Siting Proposals as)	
Requiring a Variance)	
)	
)	

COMMENTS OF THE CITY OF KIRKLAND, WASHINGTON

These Comments are filed by the City of Kirkland, Washington ("City") to urge the Commission to deny the Petition filed by the CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. The City also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 USC 332(c)(7)(B) governs wireless tower sitings to the exclusion of Section 253.

Section 332(c)(7)(B)(i) provides:

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(II) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

1 Section 253 on the other hand provides that no local government may prohibit or effectively
2 prohibit the provision of telecommunications services. The language in Section 332 is specific to
3 wireless service facilities, while Section 253 addresses telecommunications generally.

4 Congress does not enact redundant code provisions. Further, the Supreme Court's ruling
5 in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) establishes that specific code
6 sections supersede general code sections. Section 332 is very specific as to the remedies and
7 procedures to be followed with respect to wireless facility applications.

8 Section 332(c)(7)(B)(v) provides that any person adversely affected by a local government's
9 final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The
10 court must hear and decide the suit on an expedited basis. Further, any person adversely affected
11 by a local government's act or failure to act that is inconsistent with clause 332(c)(7)(B)(iv) may
12 petition the Commission for relief. The specificity of these remedies shows that Section 332 applies
13 to wireless service facilities to the exclusion of Section 253.

14 The Commission should also deny CTIA's Petition with respect to the request that the
15 Commission should supply meaning to the phrase "failure to act." The Commission's authority to
16 interpret language in the Communications Act of 1934 is limited to areas of ambiguity. "Failure to
17 act" is not an ambiguous phrase. The word "failure" means the omission of an occurrence or
18 performance;" The word "act" means "to carry out or perform an activity." Taken together, the
19 phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion,
20 there is nothing vague or ambiguous about this statutory language which would entitle the
21 Commission to issue a declaratory ruling on this topic.

22 In addition, Congress made it clear that the time frame for responding to applications for
23 wireless facility sitings is determined by reference to the nature of the application. Section
24 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period,
25 taking into account the nature of the request." Therefore, even if ambiguity existed within the
26 statute, the FCC would be acting outside its authority by mandating a fixed time period and
27 imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

28 To assist the Commission in its evaluation, below are details specific to the wireless facility
siting process in the City of Kirkland, Washington.

1. LEGAL REQUIREMENTS FOR FACILITY SITING

In some jurisdictions, applications for facility siting may be addressed administratively,
without the need for public hearings, while others are required by state and local law to follow
certain processes and procedures. In Kirkland, some types of facilities may be approved
administratively while others require public process. The procedural requirements are set forth in
Kirkland Zoning Code, Section 117.45, the provisions of which are summarized below.

1 The following types of applications are decided by the City planning official administratively,
2 without public notice or a public hearing: applications to co-locate antennas on existing towers in
3 nonresidential zones; and attachment of antennas to existing water reservoirs, utility poles or other
support structures in any zone.

4 The following types of applications are decided by the City Planning Director following a
5 public notice and comment period (but no public hearing): Co-location of antennas on existing
6 towers in residential zones with no increase in tower height; new towers in nonresidential zones not
7 exceeding 40 feet in height; and attachment of antennas to non-residential buildings, such as
schools and churches, in residential zones.

8 The following types of applications are decided by the City Hearing Examiner following a
9 public hearing; new towers in non-residential zones exceeding 40 feet in height; and attachment of
antennas to multifamily residential buildings in residential zones.

10 The following types of applications involve a public hearing before the City Hearing
11 Examiner who makes a recommendation to the City Council: Co-location of antennas on existing
12 towers in residential zones resulting in an increase of tower height; new towers in residential zones.

13 In cases where a public hearing is required, the notice period is a minimum of 14 days.
14 See Kirkland Zoning Code, Sections 117.45, 150.30 and 152.30. Notice of the hearing is
15 distributed to property owners within 300 feet of the site, published in the City's official newspaper
16 and posted on the site. The City's wireless facility siting ordinance is Chapter 117 of the Kirkland
Zoning Code, although some of the provisions involving the hearing process are located in Chapters
150 and 152 of the Kirkland Zoning Code.

17 **2. NUMBER OF APPLICATIONS AND OUTCOMES**

18 In the past 5 years (2003-2007), the City has received 32 applications for wireless
19 facilities, all of which were approved.

20 Of these 32 applications, 4 were for collocations on existing facilities, 26 were for new
21 facilities on existing structures like water towers or buildings, and 1 was for a new tower.

22 The average time between filing of an application and final decision has been 113 days.

23 The average time for collocations has been 100 days.

24 The average time for new facilities has been 116 days.

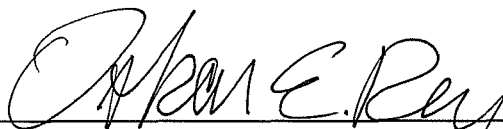
25 The average time for new towers has been 140 days.

26 By comparison, in Kirkland, the average time between application and final action for other
27 land use approvals with similar review processes in 2007 was between 70 and 132 days.

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3 **3. CONCLUSION**

4 In conclusion, the Commission does not have the authority to issue the declaratory ruling
5 requested by CTIA because it would be contrary to Congress's intentions. Further, the current
6 process for addressing land use applications ensures that the rights of citizens in our community to
7 govern themselves and the appropriate development of the community are properly balanced with
8 the interests of all applicants. The system works well and there is no evidence to suggest that the
9 Commission should grant a special waiver of state and local law to the wireless industry. Any
10 perceived difficulties experienced by wireless providers can and are adequately addressed through
11 the electoral process in each individual community and the Courts. Federal agency intrusion is
12 neither warranted nor authorized.

13 RESPECTFULLY SUBMITTED this 29th day of September, 2008.

14 
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